

US Department of Labor to Aggressively Pursue Misclassification Matters

Employers have many ways of getting into trouble. We hope that after reading this you will avoid one of them; namely, misclassifying employees as independent contractors.

The US Department of Labor (DOL) just awarded over \$10,000,000 in grants to 19 states to improve efforts of finding and prosecuting employers who improperly classify employees as independent contractors. What does this mean? In short, employers can expect increased scrutiny of their hiring practices by the DOL and state labor enforcement agencies.

In this labor environment, many employers need more help but are reluctant to hire due to costs and uncertainties regarding future workflow. Hiring “independent contractors” would appear to address that dilemma. Cognizant of this approach and the negative effects of abusing the same (e.g., lost taxes, workers not covered by Worker’s Compensation, etc.), the DOL has re-energized its prosecution of those who abuse the distinction between employee and independent contractor.

No one test or set of criteria will definitively establish whether someone is an independent contractor or employee. Rather, the focus is on a number of factors including, without limitation, whether the worker performs work customarily performed by the employer and the degree to which the employer exercises control over the worker.

If the worker is hired to perform the type of work typically performed by the employer, then this factor may well tilt the balance in favor of finding the worker to be an “employee”. For example, if a plumber lands a large job and needs an additional plumber to help with that job, the worker might well be considered an employee even though the worker was hired for only one job. If, however, the plumber hires a carpenter to re-frame a wall to accommodate the plumber’s work, then that worker’s job (carpentry) might be sufficiently different from the employer’s job (plumbing) to classify the worker as an independent contractor.

Another key factor is the degree to which the employer controls the worker’s conduct. Typically, the less control exerted by the employer, the less likely the worker will be classified as an employee (particularly if performing a different type of work as noted above).

Employers contemplating hiring “independent contractors” should consult with counsel to ensure they do not inadvertently fall victim to this latest round of government scrutiny.

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